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Public Prosecutor v Tee Chong Eu

B HIGH COURT (IPOH) — CRIMINAL APPEAL NO 41LB-8–04 OF 2016
HAYATUL AKMAL JC
3 APRIL 2017

C *Criminal Procedure — Appeal — Appeal against acquittal and discharge — House-trespass into public hall — Whether prima facie case proven — Whether magistrate erred in law and fact — Penal Code s 448*

D On 13 April 2013, a lorry carrying fertilisers arrived at Dewan Murid-Murid Tua Changkat Kruing ('the public hall'). SP2 who was an employee of a company known as Nanyang Phosphorus Fertilizer Sdn Bhd ('the company') together with his colleagues were unloading the said fertilisers when the respondent with a hoe approached and started damaging the said fertilisers with the hoe. SP2 who was scared, ran and took shelter in SP3's house. E Subsequently, the company's marketing manager ('SP4') who rented the public hall lodged a police report. The respondent was charged for an offence under s 448 of the Penal Code for house-trespass and he claimed trial to the said charge. At the close of the appellant's case, the magistrate found that the appellant failed to prove prima facie case against the respondent. The F respondent was acquitted and discharged of the said charge without his defence being called ('the magistrate's order'). Dissatisfied with the learned magistrate's order, the appellant appealed against the said order on the following five grounds: (a) the learned magistrate had erred in law and fact when she had found that the appellant failed to prove prima facie case against the respondent G and had acquitted and discharge the respondent without calling the respondent to defend himself at the end of the appellant's case; (b) the learned magistrate had erred in law and fact when she had found that the appellant failed to prove the owner of the public hall; (c) the learned magistrate had erred in law and fact when she failed to decide that the respondent had trespassed H into the public hall; (d) the learned magistrate had erred in law and fact when she had failed to consider the overall statements of SP2 and SP4; and (e) the learned magistrate had erred in law and fact when she had failed to consider and evaluate the overall evidence of the appellant's case before coming into decision at the end of the appellant's case.

I **Held,** affirming the magistrate's order:

(1) There was no evidence tendered in court to support the fact that the public hall was rented by SP4, therefore the respondent could not be said to have trespassed the said public hall. As a result, the learned magistrate

did not err when she found that the prosecution has failed to prove that: (a) the respondent had committed trespass; and (b) that SP4 was in possession of the public hall (see para 21).

(2) The learned magistrate was correct on the finding of facts that the respondent did not enter the public hall and the fight was outside the hall by the roadside. The learned magistrate found that there was no clear evidence that the respondent had trespassed the public hall and the evidence of the witnesses was only confined to the front or outside the public hall which was not sufficient to prove that the respondent had trespassed into the public hall with intention to commit crime. The court found that the fact that the respondent was holding a hoe was not sufficient and therefore, the appellant had failed to prove that the respondent had a criminal intent by allegedly trespassing into the public hall (see paras 22–24).

[Bahasa Malaysia summary

Pada 13 April 2013, sebuah lori yang membawa baja tiba di Dewan Murid-Murid Tua Changkat Kruing ('balai awam'). SP2 yang merupakan seorang pekerja sebuah syarikat yang dikenali sebagai Nanyang Phosphorus Fertilizer Sdn Bhd ('syarikat') bersama rakan-rakannya telah memunggah baja tersebut responden telah menghampiri mereka dengan cangkul dan mula merosakkan baja tersebut dengan cangkul tersebut. SP2 telah ditakutkan, berlari dan berlindung di rumah SP3. Seterusnya, pengurus pemasaran syarikat ('SP4') yang menyewa dewan awam membuat laporan polis. Responden didakwa atas kesalahan di bawah s 448 Kanun Keseksaan untuk kesalahan menceroboh rumah dan dia memohon perbicaraan terhadap pertuduhan tersebut. Pada keakhiran kes perayu, majistret mendapati bahawa perayu gagal membuktikan kes prima facie terhadap responden. Responden dilepaskan dan dibebaskan daripada pertuduhan tersebut tanpa pembelaannya dipanggil ('perintah majistret'). Tidak berpuas hati dengan perintah majistret yang dipelajari, perayu merayu terhadap perintah tersebut atas lima alasan berikut: (a) majistret yang terpelajar telah menyalahi undang-undang dan fakta apabila dia mendapati bahawa perayu gagal membuktikan kes prima facie terhadap responden dan dibebaskan dan dilepaskan tanpa memanggil responden untuk mempertahankan dirinya pada akhir kes perayu; (b) majistret yang terpelajar telah terkhilaf dalam undang-undang dan fakta apabila dia mendapati bahawa perayu gagal membuktikan pemilik dewan awam; (c) majistret yang terpelajar telah menyalahi undang-undang dan fakta apabila dia gagal membuat keputusan bahawa responden telah mencerobohi dewan awam; (d) majistret yang berpengetahuan itu telah menyalahi undang-undang dan fakta apabila dia gagal menimbangkan keseluruhan pernyataan SP2 dan SP4; dan (e) majistret yang terpelajar telah menyalahi undang-undang dan fakta apabila dia gagal untuk mempertimbangkan dan menilai bukti keseluruhan kes perayu sebelum membuat keputusan pada akhir kes perayu.

Diputuskan, mengesahkan perintah magistret:

(1) Tidak ada bukti yang diberi kepada mahkamah untuk menyokong hakikat bahawa dewan awam disewa oleh SP4, oleh itu responden tidak boleh dikatakan telah menceroboh balai awam tersebut. Akibatnya, majistret yang terpelajar tidak terkhilaf apabila dia mendapati bahawa pendakwaan gagal membuktikan bahawa: (a) responden telah melakukan pelanggaran; dan (b) bahawa SP4 mempunyai dewan awam (lihat perenggan 21).

(2) Majistret yang terpelajar adalah betul mengenai penemuan fakta bahawa responden tidak memasuki dewan awam dan perjuangan berada di luar dewan di tepi jalan. Majistret yang dipelajari mendapati tiada keterangan yang jelas bahawa responden telah menceroboh dewan awam dan keterangan saksi hanya dihadapkan ke depan atau di luar dewan awam yang tidak mencukupi untuk membuktikan bahawa responden telah menceroboh dewan awam dengan niat untuk melakukan jenayah. Mahkamah mendapati hakikat bahawa responden memegang cangkul tidak mencukupi dan oleh itu, perayu gagal membuktikan bahawa responden mempunyai niat jenayah dengan didakwa menceroboh masuk ke dewan awam (lihat perenggan 22–24).]

Notes

For cases on appeal against acquittal and discharge, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 231–241.

Cases referred to

Ip Ying Wah v PP [1958] 1 MLJ 34 (refd)

Legislation referred to

Penal Code s 448

Mohamad Suffian bin Ja'afar (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Thinesh a/l Vadivelu (Mustafa Ling & Co) for the respondent.

Hayatul Akmal JC:

INTRODUCTION

[1] The respondent faced a charge for an offence under s 448 of the Penal Code (Act 574). He claimed trial to the said charge. At the close of the prosecution case, the learned magistrate found that the prosecution had failed to prove a prima facie case against the accused person and he was acquitted and discharged of the said charge. Dissatisfied, the appellant appealed against the said decision.

[2] The charge is as follows:

> Bahawa kamu pada 13/04/2013, jam lebih kurang 12.30 pagi di Dewan Murid-Murid Tua Changkat Kruing Ayer Tawar di dalam daerah Manjung di dalam Negeri Perak didapati telah menceroboh masuk dengan niat melakukan satu perbuatan yang menyalahi undang-undang di sebuah dewan yang disewa Chee Kee Wei, KPT 850411-04-5002, tanpa kebenarannya dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 448 Kanun Keseksaan yang boleh dihukum dibawah seksyen yang sama.

BRIEF FACTS OF THE CASE

[3] Parties will be referred to as they were in the magistrate's court. The prosecution had called six witnesses to prove their case. The learned magistrates had stated the facts of the case in her written judgment.

[4] Briefly, the complainant ('SP4') is the Marketing Manager at Nanyang Phosphorous Fertilizer Sdn Bhd ('NPFSB') and alleged that NPFSB through her had rented a hall named Dewan Murid-Murid Tua Changkat Kruing ('the public hall') from a person name Mr Pang (not called as a witness) whom SP4 claimed to be the chairman of the Persatuan Murid-Murid Tua Changkat Kruing, for the purpose of storing, displaying and selling fertiliser. It is to be noted here that SP4 admitted that she was the one who had arranged for the said rental, but however she is not sure of the actual name of Mr Pang. According to SP4, the rental was for RM100 a day and she admitted that there was no formal agreement signed between her and the chairman/Mr Pang. It was claimed that they have been renting the public hall for the past two years until the day of the incident. SP4 admitted that they only use the public hall for only three weeks for every three months and claimed that their presence is known to the villagers.

[5] SP2 is one of NPFSB employees who is said to have slept and stayed in the public hall in order to protect the fertilisers stored. On the date in question, a lorry carrying fertilisers arrived at the public hall and SP2 together with his colleagues were unloading the said fertilisers from the lorry when the accused person with a hoe (*cangkul*) approached and started damaging the said fertilisers with the said hoe. SP2 who was scared, ran and took shelter in SP3's house.

[6] SP4 after receiving a phone call from SP2, went to the public hall where she claimed the accused person cursed her and threw her handphone to the floor when she tried to record the whole incident. SP4 then lodged a police report (exh P3). SP6 was the investigating officer ('IO').

A [7] On 9 March 2016, after hearing the evidence of the witnesses and the submissions from the learned DPP and the counsel for the accused person, the learned magistrate found that the prosecution had failed to prove a prima facie case against the accused person and ordered that the accused person be acquitted and discharged. This has brought us to this appeal filed by the public B prosecutor/appellant against the said decision by the learned magistrate.

[8] The appellant gave five grounds of appeal in this petition of appeal which can be found at pp 4–5 of the appeal record ('AR') which read as follows:

C (3.1) Puan Majistret Yang Bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila telah mendapati bahawa pihak pendakwaan telah gagal untuk membuktikan kes prima facie terhadap Responden dan telah melepas membebaskan Responden tanpa dipanggil untuk membela diri terhadap pertuduhan di akhir kes pendakwaan;

D (3.2) Puan Majistret Yang Bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila pihak pendakwaan gagal untuk membuktikan pemilik Dewan Murid-Murid Tua Changkat Kruing;

(3.3) Puan Majistret Yang Bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal memutuskan bahawa Responden telah menceroboh Dewan Murid-Murid Tua Changkat Kruing;

E (3.4) Puan Majistret Yang Bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal mengambil kira keterangan SP2 dan SP4 secara menyeluruh;

(3.5) Puan Majistret Yang Bijaksana telah terkhilaf dari segi undang-undang dan fakta apabila gagal untuk meneliti dan menilai keterangan kes pendakwaan secara F menyeluruh sebelum tiba kepada keputusan di akhir kes pendakwaan.

FINDINGS OF THIS COURT

[9] It is trite law that the burden in a criminal trial is always on the G prosecution to prove their case beyond reasonable doubt and not beyond any shadow of doubt. It is the burden of the prosecution to prove all the elements of the offence on a prima facie basis at the close of the prosecution's case and to give it a maximum evaluation.

H **[10]** The accused person was charged for house-trespass which is an offence under s 448 of the Penal Code. The evidence of SP4, who was the complainant and the evidence of SP2 and SP3 who were at the the scene and SP6 who was the IO were crucial in proving the elements of the offence.

I **[11]** I find that on maximum evaluation there are material inconsistencies in the testimonies of the crucial witnesses and their evidence were not corroborated, not consistent, not credible and in the circumstances the prosecution had failed to prove a prima facie case against the accused on the said charge. From the evidence tendered before this court, I find it is not safe to

call the accused person for his defence and I am not prepared to convict the accused person if he choses to remain silent. Based on the above facts and evidence of the witnesses as well as all exhibits tendered, I find that the learned magistrate did not err in her findings and her decision was based on the maximum evaluation of the whole evidence produced by the prosecution and in this regard I agree with the learned magistrate that the prosecution had failed to prove a prima facie case against the accused person at the close of the prosecution's case.

THE DECISION BY THE LEARNED MAGISTRATE

[12] The learned magistrate had decided that based on the facts and the evidence of the witnesses as well as all exhibits tendered and the submissions by the parties, the learned magistrate had made her findings, that the prosecution had failed to prove a prima facie case against the accused person at the close of the prosecution's case and the accused person was acquitted and discharged without his defence being called.

ESSENTIAL INGREDIENTS UNDER S 448 OF THE PENAL CODE

[13] For the purpose of sustaining the charge of house-trespass under s 448 of the Penal Code, the prosecution must establish the following:

(a) the accused person committed trespass;

(b) that Chew Kee Wei is in possession/*sewa* of the public hall; and

(c) the accused person had trespassed with the intention to commit crime.

[14] In *The Law of Crimes* by Ratanlal and Dhirajlal (Bahrat Law House Pvt Ltd, New Delhi, 26th Ed), at p 2531 wrote that:

> In the absence of a definite finding that some specific offence was intended to be committed, it would be wrong to convict an accused person under his section, where the intent to commit an offence is relied upon as an element of the offence.
>
> 2. Evidence — Prove (i) that the accused committed criminal trespass; (ii) that such criminal trespass was committed by entering into, or remaining in, a building, tent, or vessel; (3) that such building, tent or vessel, was used as a human dwelling or as a place of worship, or as a place for the custody of property.

[15] In the *Penal Code (Act 574) [With Notes on Cases], Practitioner's Referencer* (International Law Book Services, 2006) at p 775 on notes on s 448 offence it was said:

> (1) ... There is no question that for the offence of criminal trespass the prosecution must prove that the entry took place with the intent to intimidate, insult or annoy

A etc. It must be proved that some criminal intent was present in the mind of the accused at the time of entry and mere knowledge that the entry will annoy the occupant of the premise is not sufficient.

B **[16]** In *Mallal's Penal Law*, MLJ (2002) at p 798 said the element of house-trespass are as follows:

(a) entry into or upon property in the possession of another;

(b) lawful entry but unlawfully remaining upon such property;

C (c) the entry into or upon or unlawfully remaining on such property must be with intent:

(i) to commit an offence; or

(ii) to intimidate, insult or annoy the person in possession of the property.

D (d) ...

(e) ...

E *The accused person committed trespass*

That Chew Kee Wei is in possession/sewa of the public hall

[17] I will discuss the first two elements together because they are F inter-related and for that purpose its best that the two elements are discussed simultaneously. Before I proceed to discuss further on this element, it is pertinent for me to discuss the main element first, ie, whether the complainant in this matter is in the possession of the public hall to begin with. I find the prosecution had failed to prove this essential ingredient since the evidence of G SP4 regarding this issue was not corroborated by the evidence of SP1 or any other evidence and it was successfully challenged by the accused person during cross examination. I find that the learned magistrate did not err when she said that all the witnesses SP1, SP2, SP3, SP4 and SP6 agreed that the public hall is a public hall (*dewan orang ramai*) which means the public and especially the H village folks of Changkat Kruing has access to the public hall either for function (*kenduri-kendara*), playing ping pong, karaoke and using the public library in the public hall.

[18] SP1 in his evidence stated he is the Head of the Village (*Penghulu*) and I that he was also the ex-chairman of the said the Persatuan Murid-Murid Tua and therefore he has a specific knowledge on how the hall can be rented out. However the learned magistrate was of the opinion that SP1 is not the person who can affirm that the public hall was rented to SP4 during the period in question.

[19] She is of the opinion that the person who can affirmed that fact (SP4 is in possession of the public hall) lies with the present chairman of the Persatuan Murid-Murid Tua who was said to have rented the public hall to SP4 or NPFSB. It is to be noted that no payment receipt was tendered in court to support the payment of RM100 to the chairman/Mr Pang, despite the fact that the said public hall had already been rented for two years as claimed by SP4. At this juncture, I find that there is no documentary or direct evidence to corroborate SP4's evidence in court.

[20] I agree with the learned magistrate and I find that the prosecution failed to prove that the hall was in fact rented to SP4, there was no agreement nor rental receipt tendered in court neither was there any credible witness adduced to confirm the fact that SP4 was renting the public hall. And SP4 was also not sure of the person's name who had rented the said public hall to her. SP1 who is the *Penghulu Kampung* was not involved with the Persatuan Murid-murid Tua and hence he was not in the position to corroborate the evidence of SP4 regarding the tenancy/*sewaan* of the said public hall. Consequently therefore, the learned magistrate was right when she found that the prosecution had failed to prove the first element that Chew Kee Wei (the complainant — (SP4)) was in fact in the possession of the public hall. The failure to establish this essential ingredient was when the prosecution failed to produced the present chairman or the person to whom SP4 was alleged to have rented the public hall from for RM100 per day. In this case it was alleged that the said agreement was just an oral agreement between SP4 and the Chairman/Mr Pang but with no corroboration to that effect. I find that the prosecution had not only failed to secured the presence of the Chairman/Mr Pang but had also failed to prove that there was such an agreement entered between SP4 and the Chairman/Mr Pang. I find that until the end of the prosecution case, nothing was tendered or proffered in court to show who had the possession of the public hall nor the supposed owner of the public hall.

[21] The learned magistrate opined that the public hall is accessible to the public especially with its many doors and it is not probable to determine who had allegedly trespassed into the said public hall. As stated in the above (para 16) a person is said to have trespassed if there is entry into or upon property in the possession of another. In this instance case there is no evidence tendered in court to support the ingredient of the said charge that the public hall was rented by a person named Chew Kee Wei (SP4), therefore the accused person cannot be said to have trespassed the said public hall. Hence I find that the magistrate did not err when she found that the prosecution has failed to prove ingredients (1) and (2) of the said charge.

The accused person had trespassed the public hall with the intention to commit crime

[22] I find that the learned magistrate did not err when she found that there were no witnesses who can confirmed that the accused person had entered the public hall and what was available in court was the fact that SP1 only saw a crowd including the accused person quarrelling outside the public hall. It is to be pointed out that at no time did the prosecution throughout the investigation carried out any identification parade to conclusively proof the identity of the alleged trespasser. The learned magistrate found that even though SP2 said he saw the accused person 'mencangkul' the said fertiliser but he never said that the accused person had trespassed into the public hall. The learned magistrate had referred to the exh and photographs (P2(A–J)) available and she found that the said fertiliser was outside the public hall. She also said SP3 only saw the accused person chasing SP2 and there was never a confirmation from SP3 that he saw the accused person entering the public hall. She has also found that SP4 only came to the scene, went to the front of the public hall and has no personal knowledge of what had happened in the public hall. The learned magistrate found that there was no clear evidence that the accused person had trespassed the public hall and the evidence of the witnesses was only confined to the front or outside the public hall which is not sufficient to prove that the accused person had trespassed into the public hall with intention to commit crime (causing damage to property). The fact that the accused person was holding a hoe is not sufficient and I find the prosecution had failed to prove that the accused person had a criminal intent by allegedly trespassing (no proof proffered by the prosecution) into the public hall. I refer to an old case *Ip Ying Wah v Public Prosecutor* [1958] 1 MLJ 34 where Buhagiar J held that:

> There is no question that for the offence of criminal trespass the prosecution must prove that the entry took place with the intent to intimidate, insult or annoy etc. It must be proved that some criminal intent was present in the mind of the accused at the time of entry and mere knowledge that the entry will annoy the occupant of the premises is not sufficient.

[23] Applying the principle as laid down by the case above, I find that to bring home the charge of criminal trespass, the prosecution must prove that the entry took place with the intent to intimidate, insule or annoy or against the law as in the present charge (*menyalahi undang-undang*). It must be proved that some criminal intent was present in the mind of the accused at the time of entry and mere knowledge that the entry will annoy the occupant of the premises is not sufficient. In this case the learned magistrate had made a finding of facts that the accused person didn't enter the public hall at all and the 'pergaduhan' was outside the hall and by the road side. To this finding I hold that the learned magistrate did not make an error in her conclusion. This conclusion is amply

supported by the evidence of SP3 who admitted that he didn't even go to the public hall and only saw the accused person chasing SP2 with the hoe.

[24] I also find that the evidence of SP2 was not credible when he said he was unloading the fertiliser from the lorry and when the accused person came and asked him whose fertiliser that was, before the accused allegedly 'cangkul' the said fertiliser and damaged it. Therefore, I find the magistrate was right when she said that there was no evidence to support that the accused person had even entered the public hall at the alleged time of the offence. I also find that it is unreasonable for the accused person to enter the public hall and 'cangkul' the said fertiliser when SP2 was unloading the said fertiliser at that time. I agree with the finding of the learned magistrate that the prosecution had also failed to prove this element.

CONCLUSION

[25] It is my considered view that the learned magistrate had given clear and sound reasons as to her findings which were derived based on the maximum evaluation of evidence available and produced before her. Her findings were not erroneous nor has she so fundamentally misdirected herself that one may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion. The learned magistrate was right in making a finding that the prosecution had failed to prove a prima facie case under s 448 of the Penal Code and she had correctly ordered that the accused person be acquitted and discharge without calling for his defence. It is a trite principle of criminal law that one cannot convict on mere suspicions no matter how strong. Only on the irrefutable evidence before the court can support a conviction to a preferred charge. In the circumstances I find no plausible reasons to disturb the learned magistrate's findings and hereby affirmed the said order for acquittal and discharge of the accused without calling for his defence.

Magistrate's order affirmed.

Reported by Lee TJ